
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE ISSUED: MAY 29 1992
CASE No.: 92-ERA-31

In the Matter of

SIMKEON KANG, M.D.
Complainant,

v.

DEPARTMENT OF VETERANS
AFFAIRS MEDICAL CENTER
Respondent,

ROBERT BOGAN, Esq.
For the Complainant

JOHN C. DI NOTO, Esq.
For the Respondent

Before: AARON SILVERMAN
Administrative Law Judge

RECOMMENDED ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Proceeding under the Energy Reorganization Act of 1974(Act).[1]

STATEMENT OF THE CASE

The Respondent move. for a recommended order granting summmary decision on the ground that the complaint is untimely and barred under the employee protection provisions of 42 U.S.C. §5851(b)(1) (1988) and 29 C.F.R. §24.3(b) (1991).[2] Section 24.3(b) provides that "[a]ny complaint shall be filed within 30 days after the occurrence of the alleged violation."

It is undisputed that the Respondent issued a letter on November 6, 1991 notifying the Complainant, Simkeon Kang, M.D., that he would be terminated from his position as a Physician with the Department of Veterans Affairs Medicial Center, Albany, New York, effective November 29, 1991. It is also undisputed that the Complainant filed his complaint of discrimination under the Act, through his attorney, on December 23, 1991.

[Page 2]

The Respondent contends that the alleged violation occurred on November 6, 1991, the date on which the Complainant received notice of termination, and, since there is no question that. that date was more than thirty days before the date of filing, summary decision should be granted as a matter of course. However, the Complainant argues that the violation occurred on November 29, 1991, the date of termination, and, thus, the complaint was timely filed, and summary decision should be denied.

Title 29 of the Code of Federal Regulations §18.40(d) provides that summary decision may be entered for a party "if the pleadings, affidavits, material obtained by discovery or otherwise...show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

Once a motion for summary decision is properly made, the burden then shifts to the non-moving party, who must set forth facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there does indeed exist a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511. The Second Circuit Court of Appeals, under whose Jurisdiction this case arises, has found that "[s]ummary jugdment is appropriate if after drawing all reasonable inferences in favor of the party against whom summary Judgement is sought, no reasonable trier of fact could find in favor of the non-moving party.'" United States v, All Right, 901 F.2d 288, 290 (2d Cir. 1990) (quoting Murray v. National Broadcasting Co., 844 F.2d 988, 992 (2d Cir. 1988), cert. denied 488 U.S. 955, 109 S.Ct. 391 (1988).

Generally, in matters involving discrimination under federal statutes, the Supreme Court has held that the date of the alleged violation is the time of the discriminatory act, not the time at which the consequences of the act become painful. see Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28 (1982); Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498 (1980). While the cited opinions concern claims brought under 42 U.S.C. §1983 and Title VII, respectively, the Ricks-Chardon rule has been extended to cover claims of discrimination raised under §5851 of the Act. English v. Whitfield, 858 F.2d 957 (4th Cir. 1988).

In English, the Court of Appeals for the Fourth Circuit held that the filing period for a complaint under the Act begins, to run on the date the employee was given Final and unequivocal notice of an employment decision." Id. at 961. The court explained, "[o]nly

upon receipt of such notice does the filing period begin to run. Until that time, there is the possibility that the discriminatory decision

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itself will be revoked, and the contemplated action not taken, thereby preserving the predecision status quo." Id.

The "final and unequivocal" nature of the notice of termination is what is at issue in this case. Although the November 6th letter clearly states that "after a review of the needs of [the] medical center" the Respondent decided to discontinue the services of the Complainant as of November 29th, the Complainant alleges, in his verified Response In Opposition to Motion for Summary Decision, paragraph 2(i), that s "Dr. Kang had many discussions with Mr. Malphurs, Medical Center Director,...from November 6, 1991 through November 26, 1991, with regard to his possible termination"; "[o]n November 6, 1991, when Mr. Malphurs gave Dr. Kang the notice of termination, he stated to him that his door was always open"; "[Mr. Malphurs] informed [Dr. Kang] that alternatives to termination were possible...includ[ing] Dr. Kang resigning at some future date, not on November 29, 1991."

These statements and actions raise a question concerning the "final and unequivocal" nature of the notice of termination, and set forth a genuine issue of material fact for trial.

Accordingly, entry of summary decision, at this point, is deemed inappropriate, and the motion is DENIED.

AARON SILVERMAN
Administrative Law Judge

Washington, DC

AS/ls

[ENDNOTES]

[1]Pub. L. No. 93-438, 88 Stat. 1233.

[2]29 CFR Part 24, et seq; Procedures for handling discrimination complaints under Federal Employee Protection Statutes.